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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965

No. [redacted] 207

GENE JACOBS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Tennessee.

OPINIONS BELOW.

Petitioner's conviction for the offense of conspiracy to violate the election laws of the State of Tennessee in violation of Section 39-1105, Tennessee Code Annotated, was affirmed by the Supreme Court of Tennessee in an unreported decision rendered on March 4, 1965 (R. pp. 135-144; Appendix G, page 23).

JURISDICTION.

The original order affirming petitioner's conviction was entered on March 4, 1965 (R. p. 145). The petition for rehearing filed on March 15, 1965 (R. pp. 148-152) was denied on April 7, 1965 (R. p. 156). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED.

Did the presentment in this case, which charged the petitioner and others with violation of Section 39-1105, T. C. A., in that they conspired to violate certain election laws of the State of Tennessee and that some of the defendants performed certain overt acts in furtherance of the conspiracy, which overt acts under the statute were an essential element of the offense, sufficiently apprise petitioner of the nature and cause of the accusation against him and provide him with sufficient information to enable him to prepare his defense, as required by the due process clause of the Fourteenth Amendment to the Constitution of the United States, where the overt acts charged were the manipulation of certain absentee ballots in the primary and general election of August 2, 1962 in the various precincts of the Second Ward of Davidson County, wherein a total of three hundred ten (310) absentee ballots were cast, but the presentment failed to describe or identify any of the absentee ballots involved in the alleged overt acts?

CONSTITUTIONAL PROVISIONS INVOLVED.

The relevant provisions of the Constitution of the United States are the Sixth Amendment and the Fourteenth Amendment, which are set forth in Appendix A, *infra*, page 9.

STATEMENT OF THE CASE.

On November 16, 1962, a lengthy presentment was returned by the Davidson County Grand Jury charging petitioner and others with conspiracy to violate certain election laws of the State of Tennessee in violation of Section 39-1105, T. C. A. This Code Section appears *infra*

as Appendix B, page 10. The text of the presentment is included below as Appendix C, page 11. After charging the general conspiracy, the presentment purported to set out certain overt acts done in furtherance of the alleged conspiracy, as required by the statute; the overt acts being that the defendants, having obtained application blanks for absentee ballots, either procured the signatures of voters of the various precincts of the Second Ward to the applications or that the defendants themselves signed the names of other voters to the applications; that they then delivered or caused to be delivered the applications to the proper offices in order to procure the mailing of absentee ballots; that they then collected the ballots from the persons to whom they were mailed and either marked the ballots or caused them to be marked at their direction by the applicants; that they obtained the signatures of the persons to whom the ballots had been mailed upon the envelopes provided for the return of the ballots to the election offices and that the petitioner then notarized the envelopes and that the defendants then returned the envelopes containing the ballots by mail to the proper election offices.

The allegations with reference to the said overt acts contain no more detailed or specific charges than may be found in the foregoing summary of these allegations. Although it is charged that very numerous absentee ballots were involved and although in fact several hundreds of absentee ballots were applied for, marked and returned to the voting precincts of the Second Ward in the election of August 2, 1962, nowhere in the indictment are the defendants apprised of any particular ballot which they are alleged to have improperly handled, or informed of the name of any voter whose ballot they are charged with mishandling, or advised to which of the precincts of the said Second Ward they contrived for any such ballot to be returned, or, for that matter, which defendant

or defendants supposedly committed any one of the overt acts. This is true notwithstanding the fact that complete information concerning each ballot upon which the State intended to proceed was of necessity available to the State at all times prior to the return of the indictment and, in fact, was a necessary element of proof upon the trial. The result was that the defendants, and particularly the defendant Jacobs, were required to go on trial upon the charge of illegally handling absentee ballots and applications but had no possible way of knowing which ballots or applications among the many hundreds of absentee ballots returned to the precincts of the Second Ward he would be charged with mishandling.

This clearly placed an insuperable burden upon the Petitioner and did not provide him with information necessary to prepare any intelligent defense.

It has been said many times by appellate courts that the fact of conspiracy can seldom be proved by direct evidence, but must be inferred from the conduct and acts of the parties. This fact, together with the requirement of an overt act contained in Section 39-1105, make it imperative that the defendant be provided with sufficient notice to defend specifically as to the allegations of the overt act. If the overt acts charged, or any of them, be proven, it is almost certain that the existence of the conspiracy will be established by the same evidence.

It is charged as an overt act that the defendants approached "various voters of said voting precincts (the first, third and fourth precincts of the Second Ward)", and obtained their signatures on applications for absentee ballots; no voter is named or designated as having been approached, and the possibilities run into many hundreds.

It is charged as a further overt act that the defendants caused to be mailed or delivered said applications to the Davidson County Primary Board or the Election Com-

missioners of Davidson County for the purpose of obtaining absentee ballots. Again the defendants are not advised of any person for whom it is charged that such an application was mailed or delivered. It is charged that the defendants had the persons to whom said ballots had been mailed to sign their names to the envelopes to be returned to the election officers without the designation of any person. It is charged that the defendant Jacobs, as Notary Public, falsely attested the signatures and acknowledgements of the persons purporting to cast legal votes in said elections. This charge in particular, by its nature, is capable of being laid with extreme exactness, definiteness and precision; however, nothing appears in the indictment from which the defendant might draw any inkling as to what particular acts are referred to. It is further charged that the defendants placed ballots in envelopes and mailed them to the proper election offices; again, there is no designation of any particular act.

It is well settled that the concept of due process requires that a defendant in a criminal prosecution be adequately informed of the nature of the charge against him with sufficient precision to enable him properly to prepare his defense. **Russell v. United States**, 369 U. S. 749 (1962); **Cole v. Arkansas**, 333 U. S. 196 (1948); **United States v. Hess**, 124 U. S. 483 (....); **United States v. Cruikshank**, 92 U. S. 542 (....).

In the Cruikshank case, the court observed:

> "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense. . . ."

In **Hallman v. United States**, 208 F. 2d 825 (CADC; 1953), the Court of Appeals observed, at page 827:

> "The Constitution requires that the accused be informed 'of the nature and cause of the accusation'

(Amendment VI), and the cases interpret that to mean that he must be so definitely informed as to be able to present his defense."

Sutton v. United States, 157 F. 2d 661 (CCA 5; 1946), involved a situation very similar to the present case. The court observed, at page 665:

"This Article contained over fifty prohibitions, the violation of each of which was a crime. Since the defendant was presumed to be innocent, he was also presumed not to know which of these prohibitions was the one intended unless the offense was definitely described in the information."

White v. United States, 67 F. 2d 71 (CCA 10; 1933), contains a very thorough discussion of the principle involved together with the citation and analysis of many cases.

The Tennessee Court in the past has recognized the necessity of furnishing the accused sufficiently detailed information to prepare his defense and has set a very high standard in this respect. **McLemore v. State**, ... Tenn. ..., 385 S. W. 2d 756 (1965); **Frost v. State**, 205 Tenn. 671 (1959); **Pope v. State**, 149 Tenn. 176 (1923); **Rugg v. State**, 141 Tenn. 362 (1918); **State v. Witherspoon**, 115 Tenn. 140 (1905); **Smartt and Carson v. State**, 112 Tenn. 543 (1903); **Cornell v. State**, 66 Tenn. 520 (1874); **Daniel v. State**, 50 Tenn. 257 (1871); **Pearce v. State**, 33 Tenn. 63 (1853); **State v. Woodson**, 24 Tenn. 54 (1844). It distinguishes the present case only because, "the gist of the offense is the conspiracy."

Petitioner would respectfully point out that under the statute involved here, an overt act is as much a part of the offense as the conspiracy itself.

The opportunity of the defendant in the present case to prepare his defense to the charges of the overt acts

in furtherance of the conspiracy was absolutely vital to his defense. There was no other practical means of defending the conspiracy charge. It was alleged that certain things were done with respect to applications for absentee ballots and absentee ballots themselves in three precincts of the Second Ward in the election of August 2, 1962, and that these things constituted the overt acts necessary to the proceeding under Section 39-1105. Yet, though it was manifestly within the power of the State to make specific allegations which would have given this defendant fair notice of the charge, and though in fact it would have been a very simple matter to do so, this was not done. The result was that in order to prepare a defense to the charges involving the overt acts, the defendant would have been required to investigate all the applications and absentee ballots involved in these three precincts. This number ran into many hundreds.

Appellant respectfully insists that such a requirement made his defense impossible as a practical matter and violated his right to be effectively informed of the charges against him, and denied him the due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This constitutional question was timely raised in the trial court by a motion to quash the presentment filed on November 28, 1962 (Appendix D, page 19; R. pp. 21-23); upon petitioner's motion for a new trial (Appendix E, page 21; R. p. 88); and by his assignment of error in the Supreme Court of Tennessee (Appendix F, page 22; R. pp. 112-113); and again in his petition to rehear filed in the Supreme Court of Tennessee on March 15, 1965 (R. pp. 147-152).

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this petition for the writ of certiorari to the Supreme Court of Tennessee be granted.

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APPENDIX A.

Constitution of the United States, Amendment 6.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment 14.

"Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

Tennessee Code Annotated, Section 39-1105:

"39-1105. Conspiracy to commit offense, defraud state or violate election laws—Penalty.—If two (2) or more persons conspire, either to commit any offense against the State of Tennessee or to defraud the state in any manner or for any purpose, or to violate any of the election laws of this state, and one (1) or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than one thousand dollars (1,000), or to imprisonment in the penitentiary for not more than five (5) years, or to both fine and imprisonment in the discretion of the jury."

APPENDIX C.

State of Tennessee, County of Davidson, September Term of the Criminal Court, 1962.

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present: That the following named defendants:

Gene Jacobs,
Jimmie Lee Himes,
William (Hootey) Powell,
Joe H. Goodwin,
James Preston Smith, and
Jeanie Dismukes,

of said County, heretofore, to-wit, on and before the 2nd day of August, 1962, and prior to the finding of this presentment, in the County aforesaid, unlawfully, wilfully, intentionally, knowingly, and feloniously did unite, combine, conspire, agree and confederate, between and among themselves, and with divers other conspirators whose names are to the Grand Jurors unknown, to violate the election laws of the State of Tennessee, in the following manner and by the following means, to-wit:

The following elections were duly authorized and allowed by the laws of Tennessee; and the date of August 2, 1962, was lawfully fixed as the date for holding of the following elections and as the date for the voters of Davidson County, Tennessee, to go to the polls and vote or to vote by absentee ballots when having a lawful reason for voting by absentee ballots:

(1) On said date, under the provisions of Code Sections 2-1801, there had been called a General Election for the election of:

Two judges of the Supreme Court of Tennessee.

One judge for the Court of Appeals of Tennessee, Eastern Grand Division.

One judge of the Court of Appeals of Tennessee, Middle Grand Division.

One judge of Division II of the Criminal Court of Davidson County.

On said date, under the provisions of Code Section 2-103, there had been duly called by the Election Commissioners of Davidson County, Tennessee, a general election for

Sheriff
County Court Clerk
Judge of Division II, General Sessions Court
County Trustee
County Register
Criminal Court Clerk
Circuit Court Clerk
Public Defender.

(2) On said same date, August 2, 1962, under the provisions of Code Sections 2-801 through 2-830, there had been duly called, authorized and allowed by law a Democratic Primary Election for nominations to the following offices, to wit:

Governor
United States Congress, 5th District
Public Service Commissioner
Two members Democratic State Executive Committee (men)
Two members Democratic State Executive Committee (women)
One State Senator, 16th District
One State Senator, 17th District
One State Senator, 18th District
Nine Direct Representatives to the Legislature from Davidson County, Tennessee.

(3) On said same date, August 2, 1962, under the provisions of Code Sections 2-801 et seq., there had been duly called, authorized and allowed by law, a Republican Primary Election for nominations to the following offices, to wit:

Governor
Two members Republican State Executive Committee (men)
Two members Republican State Executive Committee (women).

(4) And on said same date there had been duly called, authorized and allowed by law the election of two men and two women from each of the several wards of the City of Nashville and one member from each rural civil district of Davidson County to serve upon the County Democratic Executive Committee; and vice chairmen or members to serve from said wards and district upon the Davidson County Democratic Executive Committee.

The said defendants unlawfully and feloniously did unite, combine, conspire, agree and confederate, between and among themselves, and with said divers other persons whose names are to the Grand Jurors unknown, to violate the laws of Tennessee with reference to Absentee Voting, same being Code Sections 2-1601 through 2-1616, and particularly Code Section 2-1615, by aiding and abetting numerous persons in voting illegally, or offering to do so, with knowledge of such illegality; and the said defendants further did conspire, unlawfully and feloniously, to violate Code Section 2-1228 in said elections by endeavoring to induce numerous voters to show how he or she marked their ballots, and did conspire to aid, or attempt to aid, numerous voters in marking their ballots.

The said defendants unlawfully, knowingly, intentionally and feloniously did conspire to obtain absentee ballots for numerous persons in the following voting precincts of Nashville, Davidson County, Tennessee, to wit:

Second Ward, 1st precinct
Second Ward, 3rd precinct
Second Ward, 4th precinct,

which persons were not lawfully entitled to vote by absentee ballots in said 1st, 3rd and 4th precincts of the Second Ward under the election laws of Tennessee; said conspirators did plan to obtain numerous of such applications for absentee ballots by signing the names of various persons to such applications, and by stating false grounds in such applications for the issuance of ballots to be obtained from the Davidson County Democratic Primary Board and from the Election Commissioners of Davidson County, Tennessee.

And the said defendants did further conspire to have absentee ballot mailed by the Davidson County Democratic Primary Board conducting said Democratic Primary and the Election Commissioners of Davidson County conducting said General Election in Davidson County to the numerous persons for whom such false, forged and improper applications for absentee ballots had been made, same to be mailed to such persons at the address listed in said false, forged or improper applications for absentee ballots.

And said defendants did further conspire to have certain other registered voters of said three voting precincts to sign applications for absentee ballots which stated falsely that such voters by reason of business, occupation, health, education or travel were required to be, or expected to be, absent from Davidson County on the date of such elections, to wit: August 2, 1962; and did further conspire to have other voters falsely certify that by reason of illness or disability they would be unable to go to said voting precincts on said election day—all knowingly done with the intent to cause said election officials issuing absentee ballots to mail such absentee ballots to the persons named in such applications.

And the said defendants did further conspire to either go to the homes or places where such absentee ballots had been mailed by the election officials, or to send persons there for that purpose, and to collect up absentee ballots; in some instances to have the ballots cast or marked in the presence of the conspirators, and in other instances to have the voters merely sign his or her name upon the envelope in which such ballots were to be returned to the election offices, and for said conspirators after getting possession of such absentee ballots later to mark or cast the ballots, then deliver the same to Gene Jacobs for the purpose of placing his notary seal thereon; and said Gene Jacobs did conspire to attest as a notary public numerous ballots outside the presence of the persons whose signatures purported to be thereon; and said conspirators did agree to mail such forged, false, and improper ballots to said election officials as proper and legal ballots of the persons to whom they had been mailed by said election officials.

And said defendants further did conspire to induce numerous persons in voting illegally by such absentee ballots, with full knowledge of said illegality, in that numerous ballots were not to be prepared, marked and sealed in the presence of a Notary Public, Post Office official, or election official, as required by law; and said defendants did further conspire to and did attempt to cast numerous illegal ballots, knowing that such ballots were not in fact cast or signed by the registered voter for whom said absentee ballots were obtained; and said defendants did conspire to cast said illegal ballots in violation of the Absentee Ballot Law regulating the manner of obtaining, marking and casting of absentee ballots.

And said defendants further did conspire to aid and assist numerous persons in the marking of ballots out of the presence of a notary public or other proper officer, as required by law; and then to have same transported to Gene Jacobs, who was a notary public of Davidson County,

for the purpose of notarizing the signature on said ballots without witnessing the person signing or preparing his ballot as required by law; and further said defendants did conspire to obtain possession of absentee ballots and the envelopes in which such ballots should be returned to the proper officers of election, and after obtaining the same to mark and cast the ballots, then to sign the name of the person purporting to cast such ballots to the envelope to be returned to the election officials, and then mail the same as the lawful ballot of the person to whom such absentee ballots had been mailed by the election officials.

As an overt act in the furtherance of said unlawful conspiracy, the said defendants did obtain from the Democratic Primary Board of Davidson County and from the Election Commissioners of Davidson County numerous application blanks for absentee ballots; after obtaining possession of such application blanks, the said defendants did go to various voters of said voting precincts and obtain their signatures thereto stating that such voters expected to be out of Davidson County on said election date, August 2nd, 1962; in other instances the said defendants did sign, or cause to be signed, the names of other voters to the effect that such other voters would be absent, or probably absent, from Davidson County, Tennessee, on said August 2, 1962, by reason of business, occupation, health, education or travel, or to the effect that such voters, or some of them, by reason of physical disability or illness would be unable to go to said voting precincts in person on August 2, 1962, to cast their ballots in said elections;

And as a further overt act in the furtherance of said unlawful conspiracy, after obtaining possession of numerous applications for absentee ballots, in the manner and form aforesaid, the said defendants did mail or deliver, or cause to be mailed or delivered, said applications for absentee ballots to the Davidson County Primary Board of this County, or to the Election Commissioners of David-

son County, for the purpose of having absentee ballots mailed to the persons named in such applications;

And as a further overt act in the furtherance of said unlawful conspiracy, after such blank absentee ballots had been mailed to the persons for whom such applications had been made out and delivered to said election officers the said defendants did either go and collect up said absentee ballots, or did send messenger therefor; in some instances the said defendants did have the persons to whom said ballots had been mailed to sign their names to the envelopes to be returned to the election officers, and did have delivered to said defendants their said ballots, uncast and unmarked for candidates; in numerous other instances the said defendants did stand by and have some of the people receiving said ballots cast their said ballots, or mark the same, in the presence and at the direction of said defendants; in numerous other instances, after obtaining possession of such ballots the said defendants did thereafter mark and cast the same as said defendants desired that they be marked, cast or voted;

And as a further overt act in the furtherance of said unlawful conspiracy, after said ballots and the envelopes in which they were to be returned to said election offices had been collected up by the defendants, and voted, marked and cast as aforesaid, said ballots and the envelopes in which they were to be returned were delivered to defendant, Gene Jacobs, a notary public of Davidson County, Tennessee, who signed his name and placed his official seal upon the envelope in which said ballots were to be returned to said election offices, the said Gene Jacobs then and there as such notary public falsely attesting the signatures and acknowledgments of the persons purporting to cast legal votes in said elections;.

And as a further overt act in the furtherance of said unlawful conspiracy, after such absentee ballots had been

obtained, marked, voted and cast as aforesaid, the said defendants then took said ballots and placed them in the envelopes, signed and notarized in the manner aforesaid, sealed said return envelopes, and by registered mail sent said signed, notarized and sealed envelopes with marked, cast and voted ballots therein, to the Davidson County Election Commission for ballots in the general election and to the Davidson County Primary Board for ballots in the Democratic primary; all of which was then and there done by said defendants with intent that said ballots would be sent by the Davidson County Election Commission and by the members of the Davidson County Democratic Primary Board or Commissioners to said voting precincts in the 2nd Ward of Nashville, there to be cast, voted and counted as valid absentee ballots in said elections and to be counted in the said election returns.

Wherefore, the Grand Jurors Aforesaid, upon their oath aforesaid, present, that the said defendants, namely:

Gene Jacobs,
Jimmie Lee Himes,
William (Hootey) Powell,
Joe H. Goodwin,
James Preston Smith, and
Jeanie Dismukes,

of said County, heretofore, to wit, on the day and date aforesaid, with force and arms, in the County aforesaid, unlawfully, wilfully, intentionally, knowingly and feloniously, in the manner aforesaid, and by the means aforesaid, did unite, combine, conspire, agree and confederate to violate the Election Laws of the State of Tennessee, to wit: Code Sections 2-1601 through 2-1616, inclusive, and Code Section 2-1228, contrary to the form of the statutes in such cases made and provided, to wit: Section 39-1105 of the Code of Tennessee, and against the peace and dignity of the State of Tennessee.

APPENDIX D.

State of Tennessee
vs.
Gene Jacobs et al.

Code 39-1105,
Conspiracy to Violate Election Laws.

Motion to Quash.

Comes the defendant, Gene Jacobs, and respectfully represents unto this Honorable Court that a presentment was returned against him and others charging him with conspiring to violate certain election laws, and the presentment failed to inform the defendant of the particulars of his alleged offense sufficiently to enable him to prepare his defense; that the information is wanting in particularity and is so extremely general in the language of the various charges made against him that he does not have a fair or reasonable opportunity to prepare his defense; that the presentment further contains conclusions of the pleader and are so vague, indefinite, and uncertain that it is insufficient to protect the defendant from a second jeopardy for the many offenses purportedly alleged in the presentment, and is so indefinite that it will embarrass and hinder the defendant in the preparation of his defense. For all of which the defendant respectfully moves to quash the said indictment and require the State to plead further, if they be so inclined, or to return an indictment or presentment with such particularity as to properly inform the defendant as to what he is charged with, and that he be forthwith discharged until same be done.

Respectfully submitted,

William C. Wilson,

William C. Wilson,
Attorney for Defendant Gene Jacobs.

State of Tennessee,
County of Davidson. } ss.

Gene Jacobs, being first duly sworn, makes oath that the matters and things contained in the foregoing Motion to Quash are true to the best of his knowledge, information, and belief, and those matters given upon information and belief, he verily believes to be true.

Gene Jacobs.
Gene Jacobs.

Sworn to and subscribed before me this 26th day of November, 1962.

Wanda R. Ford,
Notary Public.

(Seal)

My Commission expires February 2, 1964.

APPENDIX E.

Minutes, January Term, 9th Day of March, 1963.

Saturday, March 9, 1963.

Court met pursuant to adjournment, present and presiding the Honorable Raymond H. Leathers, Judge of Division One of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

State of Tennessee,
vs. } No. .....
Gene Jacobs, et al.

Motion for a New Trial.

Comes the defendant Gene Jacobs, and moves the Court to set aside the verdict heretofore rendered by the Court and Jury in this case and grant him a new trial, for the following reasons and upon the following grounds:

I.

The Court erred in failing to sustain the defendant's motion to quash heretofore filed and made a portion of this record in that the indictment in this cause is so vague and general of nature as to preclude the defendant from properly defending himself, leaving him open to a second jeopardy under the same set of facts.

* * * * * * *

APPENDIX F.

Assignment of Error.

I.

The trial court erred in overruling defendant's motion to quash the indictment upon the grounds that it was so vague as not to properly inform the defendant of the charges against him with sufficient certainty to enable him intelligently to defend or to be protected from a subsequent trial for the same acts; this being in violation of the defendant's substantive right to a trial upon a proper indictment as secured by Article I, Section 9, of the Constitution of Tennessee, and to the due process of law under the Fourteenth Amendment to the Constitution of the United States.

APPENDIX G.

Gene Jacobs, Joe H. Goodwin, and James Preston Smith,
Plaintiffs in Error,
v.
State of Tennessee,
Defendant in Error.

Davidson Criminal.
Honorable Raymond H. Leathers, Judge.

For Plaintiffs in Error:

William C. Wilson, Nashville, Tennessee, for Gene Jacobs;
Jack Norman, Jr., Jack Norman, Sr., Nashville, Tennessee, for Joe H. Goodwin;
Dan Garfinkle, Nashville, Tennessee, for James Preston Smith.

For Defendant in Error:

Thomas E. Fox, Assistant Attorney General, Nashville, Tennessee.

Opinion.

This was a prosecution upon a presentment preferred by the grand jury against defendants Gene Jacobs, Jimmie Lee Himes, William (Hootey) Powell, Joe H. Goodwin, James Preston Smith, and Jeanie Dismukes, charging them with a conspiracy, under T. C. A., § 39-1105, "to violate the election laws of Tennessee," to-wit: the laws (T. C. A., §§ 2-1601-16) governing absentee voting, and the law (T. C. A., § 2-1228) relating to the marking of ballots at polling places.

Pending this appeal Joe H. Goodwin has died and, therefore, the case as to him will be abated and not considered in this opinion.

The plaintiffs in error, Jacobs and Smith, did not preserve a bill of exceptions and, therefore, there is no proof before us as to their guilt or innocence, and under the law we are permitted to review only those assignments of error directed to the technical record. The technical record is composed only of the pleadings, minute entries, verdict of the jury, and judgment of the court thereon. Neither the evidence nor the charge of the courts are properly parts of the technical record. A motion for a new trial is only a pleading and is not evidence of what occurred on the trial. **Baldwin v. State**, 204 Tenn. 639, 643, 325 S. W. 2d 244 (1959).

Jacobs moved to quash the presentment upon the grounds that its allegations were so general and vague that they did not inform him of the acts charged against him so as to enable him to prepare for his defense and so as to protect him from being prosecuted again for the same matters. His motion was overruled and he and all the other defendants pleaded not guilty. Upon the trial, Himes pleaded guilty.

The jury returned a verdict finding each defendant "guilty of conspiracy to violate election laws," and fixed Jacobs' punishment at one year in the penitentiary; Himes' punishment at sixty days in the workhouse; Powell's punishment at a fine of $100.00 and three days in the county jail; Goodwin's punishment at a fine of $750.00 and ninety days in jail; Smith's punishment at ninety days in jail; and Dismukes' punishment at $250.00 and three days in jail. Judgment was entered accordingly.

Defendants Himes, Powell and Dismukes acquiesced, did not appeal from the judgments. Defendants Jacobs, Goodwin and Smith appealed in error and each has separately assigned errors. The errors assigned by Goodwin will not be considered. No bill of exceptions was saved and the case is before us only upon the technical record as aforesaid, that is, the presentment, Jacobs' motion to

quash entered on the minutes, the court's action overruling it, and the other minute entries, including the verdicts and judgments.

We first consider Jacobs' assignment of error. It is that the trial court erred in overruling his motion to quash the presentment, because it was so vague as not to inform him of what he must be prepared to meet, or protect him against subsequent prosecutions for the same matters, and that this action of the trial court violated his rights under the Constitutions of Tennessee (Article 1, Section 14), and of the United States (Fourteenth Amendment, Section 1).

As stated, the presentment charged defendants with a conspiracy to violate the election laws of Tennessee, under T. C. A. § 39-1105, which is in these words:

> If two (2) or more persons conspire, either to commit any offense against the State of Tennessee or to defraud the state in any manner or for any purpose, or to violate any of the election laws of this state, and one (1) or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than one thousand dollars ($1,000), or to imprisonment in the penitentiary for not more than five (5) years, or to both fine and imprisonment in the discretion of the jury.

The presentment averred that on August 2, 1962, there was held a general election for the election of a number of state and county officers, and on the same day there was a Democratic Primary Election and a Republican Primary Election for nomination to various offices set out. The presentment then generally charged the two requisites under the statute (T. C. A. § 39-1105): (1) a conspiracy to violate the election laws of the State and (2) a number

of overt acts by defendants to effect the object of the conspiracy.

The averments of the conspiracy as set out in the lengthy presentment, consisting of eight legal size pages, charge, among other things, that all of the defendants conspired, etc. The pertinent portions of the presentment are:

> The said defendants unlawfully and feloniously did unite, combine, conspire, agree and confederate, between and among themselves, and with said divers other persons whose names are to the Grand Jurors unknown, to violate the laws of Tennessee with reference to Absentee Voting, same being Code Sections 2-1601 through 2-1616, and particularly Code Section 2-1615, by aiding and abetting numerous persons in voting illegally, or offering to do so, with knowledge of such illegality; and the said defendants further did conspire, unlawfully and feloniously, to violate Code Section 2-1228 in said elections by endeavoring to induce numerous voters to show how he or she marked their ballots, and did conspire to aid, or attempt to aid, numerous voters in marking their ballots.

And the bill in general charged defendants with a number of overt acts done to effect the object of the conspiracy. These charges were in substance as follows:

(1) That defendants "feloniously did conspire to obtain absentee ballots for numerous persons" in the first, third and fourth precincts of the second ward in the City of Nashville, Davidson County, and

> did plan to obtain **numerous such applications** for absentee ballots by signing the names of **various persons** to such applications, and by stating false grounds in such applications for the issuance of ballots to be obtained from the Davidson County Democratic Primary Board, and from the Election Commissioners of Davidson County, Tennessee. (Emphasis supplied.)

(2) Defendants

did further conspire to have absentee ballots mailed by the Davidson County Democratic Primary Board conducting said Democratic Primary and the Election Commissioners of Davidson County conducting said General Election in Davidson County to the **numerous persons** for whom such false, forged and improper applications and absentee ballots had been made, same to be mailed to **such persons** at the address listed in said false, forged or improper applications for absentee ballots. (Emphasis supplied.)

(3) Defendants

did further conspire to have **certain other registered voters** of said three voting precincts to sign applications for absentee ballots which stated falsely that **such voters** by reason of business, occupation, health, education or travel were required to be, or expected to be, absent from Davidson County on the date of such elections . . . and did further conspire to have **other voters** falsely certify that by reason of illness or disability they would be unable to go to said voting precincts on said election day—all knowingly done with the intent to cause said election officials issuing absentee ballots to mail such absentee ballots to the **persons named** in such applications. (Emphasis supplied.)

(4) That defendants

did further conspire to either go to the homes or places where such absentee ballots had been mailed by the election officials, or to send **persons** there for that purpose, and to collect up absentee ballots; in some instances to have the ballots cast or marked in the presence of the conspirators, and in other instances to have the voters merely sign his or her name upon the envelope in which such ballots were

to be returned to the election offices, and for said conspirators after getting possession of such absentee ballots later to mark or cast the ballots, then deliver the same to Gene Jacobs for the purpose of placing his notary seal thereon; and said Gene Jacobs did conspire to attest as a notary public **numerous ballots** outside the presence of the **persons** whose signatures purported to be thereon; and said conspirators did agree to mail such forged, false and improper ballots to said election officials as proper and legal ballots of the **persons** to whom they had been mailed by said election officials. (Emphasis supplied.)

(5) Said defendants

further did conspire to induce **numerous persons** in voting illegally by such absentee ballots, with full knowledge of said illegality, in that **numerous ballots** were not to be prepared, marked and sealed in the presence of a Notary Public, Post Office official, or election official, as required by law; . . . (Emphasis supplied).

We do not think there is any merit in this assignment because if the defendants only had a general intent to cause votes to be illegally cast in the election or committed only one of the five overt acts alleged in the presentment without ever forming an intent to cause any particular person's ballot to be illegally cast, the conspiracy would have been committed for the gist of the offense is the conspiracy and not the substantive act. **Galatas v. United States**, 80 F. 2d 15, cert. denied, 56 S. Ct. 574, 298 U. S. 711, 8 L. ed. 998.

To the same effect is 15 C. J. S., **Conspiracy**, § 84 (1939), where it is said:

> . . . but where no intent as to any particular person was formed, it should charge an intended wrong against some person, persons or class of persons or

the general public. In such cases it is unnecessary to designate any particular individual. 15 C. J. S. at 1116-1117.

The plaintiff in error, Smith, contends that:

The Court erred in charging the jury they could sentence the defendant to serve time in the workhouse or jail if they found him guilty as charged in the presentment.

We cannot consider this assignment because the charge of the court is not before us by way of a bill of exceptions. The charge of the court does not constitute a part of the technical record and cannot be considered on appeal unless made a part of the bill of exceptions, and since there is no bill of exceptions in this case, the charge cannot be considered. **Clark v. State**, 159 Tenn. 507, 19 S. W. 2d 228 (1929).

The remaining assignment of error of Smith is that the Court erred in overruling and disallowing ground 6 of his motion for a new trial, viz.: The verdict of the jury is void in that the jury had no legal right to sentence the defendant to serve ninety days in jail because the minimum penalty prescribed under the statute is not one year in the penitentiary but the minimum penalty is a one cent fine.

Punishment for the offense is set out in T. C. A., § 39-1105. It provides for a fine of not more than $1,000.00 or imprisonment in the penitentiary for not more than five years, or both a fine and imprisonment in the discretion of jury. It is insisted that T. C. A., § 40-2703, which provides that in any felony the punishment for which is a minimum of one year, the jury may fix a jail or workhouse sentence for a period less than a year, is not applicable because the minimum punishment that might be imposed for the offense under the first section referred to is a fine of one penny.

No authority is cited by counsel for the plaintiffs in error for this construction but a somewhat similar matter was considered by this Court in **Mitchell v. State**, 123 Tenn. 649, 134 S. W. 306 (1910). In that case Mr. Justice Neil, speaking for the Court, held that § 7206, Shannon's Code, now T. C. A., § 40-2703, did not apply to offenses, the punishment for which was prescribed by § 6471, Shannon's Code, now T. C. A., § 39-603, because the punishment prescribed was not a minimum of one year but a fine not to exceed $500.00 was also required and that this was in conflict with the provisions of § 7206 (now T. C. A., § 40-2703). For the reasons indicated we hold that T. C. A., § 40-2703, does apply and covers the punishment for the offense defined in T. C. A., § 39-1105.

Although the present problem is similar to that discussed in the **Mitchell** case, there is a difference, namely, T. C. A., § 39-1105, does not provide that the sentence must be both a fine and imprisonment, but provides that it may be either or both. Consequently, the jury in the present case could fix the minimum punishment at confinement in the penitenitary for one year and assess no fine.

Criminal statutes should be construed liberally in favor of the defendants. This rule is too well established to require the citation of authority. Construing the statute with this in mind justifies the construction placed thereon by the trial judge. The jury found Smith guilty. He cannot complain that his punishment was fixed at only ninety days in the workhouse when it could have been fixed at not more than five years in the state penitentiary. T. C. A., § 39-1105.

For the foregoing reasons all assignments of error are overruled and the action of the trial court is affirmed.

Per Curiam.

APPENDIX H.

Supreme Court, Nashville

Gene Jacobs,
vs.
State of Tennessee.

Davidson Criminal.
Affirmed.

Came the plaintiff.. in error in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and on consideration thereof, this Court is of opinion that there is no reversible error on the record, and that judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that plaintiff.. in error, for the offense of conspiracy to violate election laws as charged in the indictment, be delivered to the warden of the penitentiary or his agent and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than one year, commencing on the day of his reception at said penitentiary.

The plaintiff.. in error will pay the cost of the cause accrued in this Court and the Court below, and execution may issue from this Court for the cost of the appeal. A procedendo will be issued to the said Criminal Court of Davidson County directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Warden to the end that this judgment may be executed. 3-4-65.

Office of the Clerk of the Supreme Court of the Middle Division of the State of Tennessee.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court, pronounced at its December Term, 1964, in the case of Gene Jacobs vs. The State, as the same appears of record in my office.

In testimony whereof I have hereto set my hand and affixed the seal of the Court, at office in the Supreme Court Building, at Nashville, on this the 4th day of March, 1965.

....., Clerk,

By .....Deputy Clerk.

APPENDIX I.

Gene Jacobs, Joe H. Goodwin, and James Preston Smith

v.

State of Tennessee.

Davidson Criminal.

Opinion on Petition to Rehear.

Plaintiff in error, Gene Jacobs, has filed a petition to rehear, to which an answer has been filed by the State.

We have reviewed the petition and answer and the authorities relied upon therein. Petitioner calls nothing to our attention of law or fact which we did not consider in our original opinion. Therefore, in conformity with Rule 32, of the Rules of this Court, the petition to rehear is denied.

Per Curiam.

APPENDIX J.

Supreme Court, Nashville.

Gene Jacobs
vs.
State of Tennessee.
} Davidson Criminal.

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 4/7/65.

Office of the Clerk of the Supreme Court
For the Middle Division of the
State of Tennessee.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the order denying petition to rehear of said Court, pronounced at its December term, 1964, in the case of Gene Jacobs against State of Tennessee as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Supreme Court Building at Nashville, on this, the 7th day of April, 1965.

..... Clerk,

By ....., Deputy Clerk.

APPENDIX K.

Supreme Court, Nashville.

Gene Jacobs,

vs.

State of Tennessee.

} Davidson Criminal.

Stay Order.

Upon application of plaintiff in error, Gene Jacobs, he is hereby granted a stay of execution of judgment of this Court for a period of ninety days from March 4, 1965, and pending the disposition of a petition for certiorari to the Supreme Court of the United States; and during said time the plaintiff in error may remain released on his present bond; and it is so ordered.

The Clerk of this Court will issue a certified copy of this Order to the Criminal Court of Davidson County and to the Sheriff of Davidson County. 3/4/65.

Weldon B. White,
Justice.